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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CHARLES CARTER,

Petitioner,

v.

BALTIMORE CITY POLICE DEPARTMENT
AND
COMMISSIONER EDWARD V. WOODS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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QUESTION PRESENTED

Does a state court decision denying a vested, non-probationary police officer back salary and benefits, subsequent to a judicial reinstatement following an improper termination, deprive that officer of vested rights without a hearing in violation of the Due Process Clause of the Fourteenth Amendment?

TABLE OF CONTENTS

	Page
Opinions Below.....	1
Statement of Jurisdiction.....	4
Constitutional and Statutory Provisions Involved.....	4
Statement of the Case.....	5
Reason for Granting the Writ....	11
THE DENIAL OF A VESTED, NON-PROBATIONARY POLICE OFFICER'S BACK SALARY AND BENEFITS, SUBSEQUENT TO A JUDICIAL REINSTATEMENT FOLLOWING AN IMPROPER TERMINATION, DEPRIVES THAT OFFICER OF VESTED RIGHTS WITHOUT A HEARING, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.....	11

TABLE OF CITATIONS

Cases Cited:

Albemarle Paper Company v. Moody, 422 U.S. 405 (1975).....	17
Burt v. Abel, 585 F.2d 613 (4th. Cir. 1978).....	19
Board of Regents v. Roth, 408 U.S. 564 (1972).....	21

Carter v. Baltimore City Police Department, No. 1788, September Term, 1991, Court of Special Appeals..... 3

Carey v. Piphus, 435 U.S. 247 (1987).....17, 18, 19

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985)..... 21

General Motors Corp. v. Bark 79 Md. App. 68, 555 A.2d 542 (1989)..... 14, 15

Himmelbrand v. Harrison, 484 F.Supp. 803 (W.D. Va 1980)..... 19

Jones v. Baltimore City Police Department, 326 Md. 480, 606 A.2d 214 (1992)..... 15

Keyer v. Civil Service Commission of City of New York, 397 F.Supp. 1362 (E.D. NY 1975)..... 20

Vega v. Civil Service Commission, City of New York, 385 F.Supp 1376 (S.D.N.Y. 1974).. 20

Thomas v. Ward, 529 F.2d 916, (4th Cir. 1975)..... 20

Statutes Cited:

Code of Public Local Laws of Baltimore City, sec. 16-11..... 20

United States Constitution Cited:

U.S. Const. amend XIV,
sec. 1 .....passim

APPENDIX

Unpublished Opinion of the Court
of Special Appeals of
Maryland Dated May 15, 1992..... Apx. 1

Order of the Court of Appeals of
Maryland Dated October 7, 1992.. Apx. 14

No.

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OPINIONS BELOW

On November 30, 1989, Petitioner Charles Carter was terminated by the Baltimore City Police Department

following a disciplinary Trial Board at which he was found guilty of misconduct. On September 17, 1990, the Circuit Court for Baltimore City found that the trial board had improperly relied on a probation before judgment in a misdemeanor action, and remanded the case to the Departmental Trial Board which had convicted Carter for a de novo trial board to reconsider all of the Department's charges against Carter.

On November 16, 1990, the Department convened a second Trial Board, which again found Carter guilty of the charges brought against him. This time, the Trial Board recommended a punishment of sixty days suspension without pay, with which the Baltimore Police Commissioner concurred.

Carter appealed that decision to the Circuit Court for Baltimore City. On June 24, 1991, the Circuit Court affirmed

the Department's finding of fact, but reversed Carter's sixty day suspension without pay as arbitrary and capricious, and ordered that Carter be paid his back-salary for those sixty days. The circuit court did not address the pay and seniority Carter lost during the time he had been terminated, although he had raised those issues.

On July 23, 1991 Carter timely filed an appeal to the Court of Special Appeals.[1] The Court of Special Appeals issued an unreported opinion (Carter v. Baltimore City Police Department, Ct. of Special Appeals of Md., No. 1788, September Term, 1991) affirming the decision of the circuit court (Apx. 1).

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[1] That appeal was consolidated with the state circuit court action challenging, inter alia, the constitutionality of the Department's refusal to provide Carter the lost pay and seniority.

The Court of Special Appeals issued a Mandate on June 15, 1992. On June 29, 1992, Carter timely filed a petition for Writ of Certiorari in the Court of Appeals of Maryland. On October 7, 1992 the Court of Appeals issued an order denying Carter's Petition for Writ of Certiorari (Apx. 14).

STATEMENT OF JURISDICTION

The Order of the Court of Appeals of Maryland denying Carter's Petition for Writ of Certiorari was issued on October 7, 1992. This Court's jurisdiction is involved pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, sec. 1
...nor shall any State deprive any person of life, liberty or property, without due process of law...

Code of Public Local Laws of Baltimore City sec. 16-11,(1980)

(a) Regulations. All members of the Department, except those serving at the pleasure of the Commissioner, and those on probationary status under Section 16-10(e)(1), shall be retained in the Department during good behavior and efficiency and may be dismissed or removed, from the Department only for cause, in accordance with rules, regulations, or orders to be prescribed by the Commissioner for the government and discipline of members of the Department.

* * *

(b) Procedures. No member of the Department may be so dismissed or removed except after written charges have been preferred, reasonable notice provided, and full opportunity afforded to be heard in his own defense, either before the Commissioner, or before a Disciplinary Board which may be created by him, consisting of such members of the Department as he may from time to time determine.

STATEMENT OF THE CASE

Petitioner, Charles Carter, joined the Baltimore City Police Department on November 23, 1981. On November 30, 1989, Officer Carter was terminated by the Department following a disciplinary Trial Board at which he was found guilty of misconduct related to harassing his

girlfriend.

On September 17, 1990, the Circuit Court for Baltimore City ordered that the case be remanded to the Department for a de novo trial board to reconsider all of the Department's charges against Carter. The reason was that the first hearing relied solely on a probation before judgment Carter received at a misdemeaner trial; a probation before judgment is not a conviction under Maryland law. No award of back-salary was made at that time, presumably pending the outcome of the second Trial Board. If the Trial Board found Officer Carter guilty after proper proceedings and terminated him, the back-pay issue would be moot. However, if any punishment less than termination resulted, then the payment of back-pay would be appropriate.[2]

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[2] These are the Petitioner's conclusions as to why back-pay was not addressed; the circuit court was silent on the matter.

On November 16, 1990, the Department convened a second Trial Board, which again found Carter guilty of the charges. As a result, the Trial Board recommended a punishment of sixty days suspension without pay, with which the Baltimore Police Commissioner concurred. Neither the Department nor the Commissioner indicated that the punishment also included the period from November 30, 1989 to December 19, 1990, during which Carter was terminated and received no pay.

Officer Carter was reinstated to the Baltimore City Police Department, by order of the Commissioner, effective December 19, 1990. The Department has refused, however, to pay Carter the back-salary he was denied during his earlier termination, from November 30, 1989 to December 19, 1990. Moreover, the

Department has refused to reinstate Carter, for pay and seniority purposes, as of his original November 23, 1981 Entry On Duty Date (EOD). Instead, the Department informed Carter that his new EOD date would be the original date, less the length of his termination.

Carter appealed the second decision of the Departmental Trial Board and the Police Commissioner to the Circuit Court for Baltimore City, asserting that "the Department has totally disregarded Plaintiff's rights under the 14th Amendment to the United States Constitution to due process. . ." On June 24, 1991, the Circuit Court for Baltimore City affirmed the Department's finding of fact, but reversed Carter's sixty day suspension without pay as arbitrary and capricious, and ordered that Carter be paid his back-salary for those sixty days. Again, no mention was

made of the approximate one year termination. Officer Carter appealed the decision, based upon the circuit court's failure to address this issue. Officer Carter also filed a writ of mandamus in the circuit court, challenging the decision not to accord him the retroactive relief; that case was consolidated with the appeal in the Court of Special Appeals.

Carter raised his federal constitutional claims in both his Petition for Writ of Mandamus, and his appellate court briefs as well as at oral argument. In his circuit court Petition for Writ of Mandamus Carter alleged in Count II that "defendant's actions described herein were taken under color of state law, and violate 42 U.S.C. section 1983, because they deprive him of a vested right without due process of law." Carter's initial argument in his

accompanying memorandum also raised the issue of a violation of his due process rights:

> The Defendant's refusal to pay the Plaintiff the back-salary due him constitutes a punitive action without a hearing in violation of the LEOBR and the due process guarantees of the fourteenth Amendment.

Carter also asserted that "the fourteenth amendment to the United States Constitution prohibits the removal of a vested property right without a hearing" and that the punitive action of his loss of back pay "has been imposed without the requisite hearing necessitated by the LEOBR and the Fourteenth Amendment to the United States Constitution."

The Court of Special Appeals, after acknowledging Carter's first issue as raising a Fourteenth Amendment claim, affirmed the circuit court's decision and held that no federal constitutional violation occurred. The court found that

Carter did have "his hearing on the issues involved as required under (730 of the LEOBR and the Due Process clause of the fourteenth amendment."

Carter timely filed a petition for Writ of Certiorari with the Court of Appeals of Maryland which again raised the 14th amendment due process issue. Carter argued that both "the LEOBR and the due process clause of the fourteenth amendment required pre-deprivation hearings." On October 7, 1992 the Court of Appeals of Maryland denied Carter's petition for Writ of Certiorari (Apx. 14).

REASONS FOR GRANTING THE WRIT

THE DENIAL OF A POLICE OFFICER'S BACK-SALARY AND BENEFITS, SUBSEQUENT TO A JUDICIAL REINSTATEMENT FOLLOWING AN IMPROPER TERMINATION, CONSTITUTES A PUNITIVE ACTION WITHOUT A HEARING IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The Petitioner, Officer Charles

Carter, is seeking to have his back-salary repaid and his benefits and seniority rights reinstated because he has been deprived of all three as a result of his termination from November 30, 1989 to December 19, 1990. As a result of the first appeal to the circuit court, the entire decision was invalidated, including the punishment, because it appeared that the Trial Board had rendered its decision based on the probation before judgment entered against Carter in his harassment case. Because the Trial Board based its decision to terminate Carter on the probation before judgment, the findings and punishment were invalid ab initio. That the decision is invalid is supported by the fact that, on remand, the second trial board made de novo findings and imposed a sixty-day suspension.

The question presented by this

petition is whether the police department may terminate an officer, pending appeal of trial board findings adjudicated to be improper, and thereafter refuse to compensate that officer for the de facto punishment of losing back-pay and benefits as a result of the wrongful termination. The question is novel, without prior cases addressing such an issue; however, it is an issue likely to recur.

The issue involved in this case is one of substantial importance because it could affect the rights of thousands of individuals employed by federal and state governments and, indeed, the rights of any citizen whose vested rights may at some time be addressed before an administrative agency. By denying Carter's Petition for Writ of Certiorari, the court below failed to correct the decision of the Court of Special Appeals

of Maryland which held, in cursory form, that none of Carter's rights under the United States Constitution were violated.

The Court of Special Appeals ruled that on the first appeal to the Circuit Court, "Judge Ward did not find that appellant's punishment was 'illegal'." (Apx. 9). However, the court did acknowledge that Judge Ward could not determine from the record on which of the charges the first Trial Board based its decision to terminate the Petitioner. Therefore, the court noted, "it would have been improper for the Trial Board to have discharged" Carter for the probation before judgment he received (Apx. 8-9, emphasis added). Clearly the circuit court's order of remand for de novo proceedings was intended to expunge the entire record and, as a consequence, revoke the punishment of termination. Cf. General Motors Corp. v. Bark, 79 Md. App.

68, 555 A.2d 542 (1989) (a de nova trial puts all parties back at "square one" to begin again just as if the adjudication appealed from had never occurred).

In fact, there is no doubt that, under Maryland law, a probation before judgement is not a coviction, Jones v. Baltimore City Police Department, 326 Md. 480, 484, 606 A.2d 214, 218 (1992), and therefore should not be the sole basis of a termination. As such, Carter's first termination was at least improper, if not illegal.

The Court of Special Appeals attempted to buttress the argument that a sixty-day suspension was not arbitrary and capricious by pointing out that the Police Commissioner had full authority to discharge any member of the department. The court states that "[i]t was wholly within the discretion of the Police Commissioner to terminate the

[Petitioner] on the basis of the charges other than violation of a criminal statute, even after the remand by Judge Ward." (Apx. 12). However, the Commissioner did not impose such a punishment, nor did the trial board recommend it. Of equal importance is the fact that on the second state circuit court appeal, the court found even a sixty-day suspension arbitrary and capricious, a decision the Department did not appeal.

The upshot of the various proceedings below is that Officer Carter has been punished in the form of one year's loss of pay and the loss of over a year of seniority, yet no hearing board ever recommended such extreme punishment, nor did the Commissioner ever sanction such a result. The circuit court reversed the only punishment meted out by the Department, the sixty-day suspension, and

no further recommendations have been made. The charges against Officer Carter have been fully and finally decided so no additional hearings are warranted or permissible.

Although this Court has addressed a related issue in Albemarle Paper Company v. Moody, 422 U.S. 405 (1975), where it recognized an award of back pay following a violation of the Civil Rights Act of 1964, the Court has not squarely resolved the issue of back pay in administrative hearings.

In Carey v. Piphus, 435 U.S. 247 (1978) the Court made clear that a failure to provide procedural due process under Section 1983 is an independent constitutional tort, with or without proof of injury. The court held that a failure to provide procedural due process would not give rise to an entitlement to more than nominal damages without a

showing that some independent harm was caused by the procedural depravation instead of the underlying substantive right. However, the Court acknowledged, without criticism, that lower courts have held to the contrary in situtations involving vested public employees with a property interest in their job. Id. at 261. Carter is not requesting the "windfall" for emotional distress as was alleged in Carey; instead, Carter is asking only for make-whole compensation in the form of back pay.

While there is no clear holding by the Court on a case such as this, this is a particularly appealing case in which to address the issue of back pay in administrative hearings. Because Carter's trial board hearing did not result in his termination, (in fact, even the trial board's sixty day suspension was declared improper by the circuit

court) Carter's due process violation was not simply harmless error. Instead, Carter's loss of back pay is a true, clear and identifiable harm, making it even more important to accord him the right to back pay.

Lower court decisions are in conflict concerning the application of back pay to situations such as this. In Himmelbrand v. Harrison, 484 F.Supp. 803 (W.D. Va. 1980) the court held that where just cause is found to have existed for the termination, a worker would not be entitled to back pay as compensatory damages for any proven violation of his right to procedural due process. See also Burt v. Abel, 585 F.2d 613 (4th Cir. 1978) where the court, relying on Carey held that a school teacher was not permitted to allege lost pay as damages attributable to the procedural depravation, when it was determined that

she was discharged for just cause.

Conversely, in Keyer v. Civil Service Commission of City of New York, 397 F.Supp. 1362 (E.D. N.Y 1975) a civil service employee was entitled to sue for back pay after a dismissal in violation of his established right to a hearing. See also Thomas v. Ward, 529 F.2d 916, 920 (4th Cir. 1975) (improperly terminated teacher with a property interest in continued employment was entitled to an award of back pay); Vega v. Civil Service Commission, City of New York, 385 F.Supp 1376 (S.D.N.Y 1974) (a proper hearing was not conducted for a correctional officer with a property interest in his job, resulting in reinstatement and back pay).

At all times relevant hereto, Carter was a non-probationary officer whose continued employment could be terminated only for cause. See section 16-11, Code

of Public Local Laws of Baltimore City (1980). The due process clause of the fourteenth amendment requires a proper hearing prior to the deprivation of certain rights. See generally Board of Regents v. Roth, 408 U.S. 564, 569-570 (1972) and Cleveland Bd. of Edu. v. Loudermill, 470 U.S. 532, 542-545 (1985). The decision below allows government agencies to terminate an officer pending appeal of the trial board's findings ultimately adjudicated to be improper, and thereafter refuse to compensate that officer for the de facto punishment of losing back-pay and benefits as a result of the wrongful termination. Therefore, the punitive action and its results should be reversed.

Finally, there is a strong possibility that situations similar to those at issue here will arise often. Any time an officer is wrongfully terminated as a

result of defective charges or a defective administrative hearing, that officer will be at risk of forever losing pay and seniority benefits even if an appeals court reverses the erroneous decision. For these reasons, there is a compelling need to provide the Petitioner with an effective remedy at this time, and to clarify the law on this unique issue.

Respectfully submitted

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UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

NO. 1199

September Term, 1991

CHARLES H. CARTER

v.

BALTIMORE CITY POLICE DEPARTMENT

No. 1788

September Term, 1991

CHARLES H. CARTER

v.

BALTIMORE CITY POLICE DEPARTMENT

ET AL.

Alpert,
Bloom,
Cathell,
JJ.

Per Curiam

Filed: May 15, 1992

Appellant, Charles Carter, joined the Baltimore City Police Department, appellee, on 23 November 1981. On 22 November 1989 appellant was brought before a departmental disciplinary hearing board to answer allegations that he had violated the rules and regulations of the Department. The allegations centered around an incident in which appellant allegedly violated a criminal statute by harassing his girl friend, another police officer. Appellant was convicted, in the District Court for Baltimore City, of harassment. Md. Ann. Code art. 27, § 121A (1992 Repl. Vol.). He appealed and the Circuit Court for Baltimore City granted him probation before judgment (PBJ), pursuant to Md. Code Ann., art. 27, § 641. On 30 November 1989, following a disciplinary Trial Board proceeding in which appellant was found guilty of violating a criminal

statute, failing to notify the Police Commissioner of criminal statute, failing to notify the Police Commissioner of criminal charges filed against him, and of conducting himself in a manner unbecoming to the Baltimore City Police Department, the Department terminated his employment as a police officer. Carter appealed that decision, and on 17 September 1990, the Circuit Court for Baltimore City (Ward, J.) remanded the case to the Trial Board and ordered that the entire matter be heard de nova. The basis for the circuit court decision was its inability to determine if the Department had fired appellant for violating a criminal statute or for violating other administrative charges. Judge Ward ruled that if the Department fired appellant for violating a criminal statute, based solely on the convictions, without making an independent determina-

tion of the facts of the case, the decision was improper because appellant ultimately was given a PBJ.

On 16 November 1990, the Trial Board found appellant guilty of failing to notify the Police Commissioner of criminal charges filed against him and of conducting himself in a manner unbecoming of the Baltimore City Police Department. Rather than conduct its own hearing into the facts of the alleged violation of the criminal statute, the Department dismissed that administrative charge. The Trial Board recommended that appellant be suspended without pay for 30 days on each charge, for a total of 60 days. The Police Commissioner accepted the recommendation of the Trial Board and, on 18 December 1990 ordered that appellant be reinstated as a police officer and that he be suspended without pay for 60 days. The reinstatement did not provide for

back pay from November 7 of the previous year.[1]

Appellant once again appealed, and the Circuit Court for Baltimore City (Caplan, J.), on 24 June 1991, affirmed the Trial Board's findings of fact but reversed the 60-day suspension without pay, finding that penalty to be arbitrary and capricious. The Department chose not to appeal from the reversal of the 60-day suspension, but Carter has appealed, to present the following issues for our consideration:

1. Does the withholding of salary, benefits, and seniority, without a hearing, to which an employee has a vested right, constitute a violation of the Due Process

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[1]Appellant has alleged that the reinstatement put him in the status of a new employee, so that he lost all seniority that had accrued since he was hired in 1981. The reinstatement order is silent on this point, so there is nothing in the record to indicate that the penalty cost him his seniority. That matter was never addressed by the circuit court, however, and we do not deem it to be before us.

Clause of the Fourteenth Amendment to the United States Constitution and the Law Enforcement Officers' Bill of Rights?

2. Are wrongfully discharged employees entitled to relief in the form of backpay and seniority?

Perceiving no reversible error, we shall affirm the decision of the circuit court.

I

Appellant's first argument, in essence, is that two hearings were held in this case, each ending in a recommendation of punishment for appellant by the Trial Board which was affirmed by the Police Commissioner. "Yet both punishments, for different but equally significant reasons, were declared illegal by the Circuit Court of Baltimore City." Thus, appellant contends, "there has been no Trial Board hearing which has resulted in a recommendation for a year's loss of pay and/or total loss of seniority." This hearing is required, appellant

maintains, under the Law Enforcement Officers' Bill of Rights (LEOBOR) found at Md. Ann. Code art. 27, § 727 et seq. (1992 Repl. Vol.) and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[2] We disagree.

The circuit court did not declare either punishment "illegal." In the first appeal, Judge Ward remanded the matter to the Trial Board because it could not be determined from the record

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[2]Section 730 of the LEOBOR states in pertinent part that:

> (a)Notice: record. - If the investigation or interrogation of a law enforcement officer results in the recommendation of some action, such as demotion, dismissal, transfer, loss of pay, reassignment, or similar action which would be considered a punitive measure, then, ...the law enforcement agency shall give notice to the law enforcement officer that he is entitled to a hearing on the issues by the hearing board. The notice shall state the time and place of the hearing and the issue involved. An official record, including testimony and exhibits, shall be kept of the hearing.

why appellant had been discharged. The Department could have discharged appellant for failing to notify the Police Commissioner of criminal charges filed against him or for conducting himself in a manner unbecoming of the Baltimore City Police Department, or both. If it had done so, the discharge would have been proper. Had the Department discharged appellant for the underlying conduct which led to his conviction in the District Court, and ultimately PBJ in the circuit court, that too would have been proper grounds for appellant's discharge. But the Trial Board did not consider the facts that led to appellant's conviction. Instead, it merely relied on that conviction as establishing the charge that appellant had committed a crime. Because appellant was granted a PBJ by the circuit court, which in effect negates the conviction, it would have

been improper for the Trial Board to have discharged appellant on that ground. Being unable to tell if that was why appellant was discharged, or if he was discharged for one or both of the other violations, Judge Ward remanded the matter back to the Trial Board for de novo hearing. Judge Ward did not find that appellant's punishment was "illegal."

In the second appeal, heard before Judge Caplan, the court merely struck the 60-day suspension as being arbitrary and capricious. The propriety of that decision is not before us. Judge Caplan did not rule that reinstatement without back pay was improper. We take his silence on that point as an affirmance, because if appellant were entitled to back pay upon reinstatement, striking out the 60-day suspension on the ground that it was "oppressive" would have

effectively removed all punishment imposed by the Department. The suspension surely could not be deemed excessive except for the fact that appellant had lost a year's pay during the process.

Appellant had his hearing on the issues involved as required under § 730 of the LEOBOR and the Due Process Clause of the Fourteenth Amendment. The issues involved were whether appellant had: (1) violated a criminal statute; (2) failed to notify the Police Commissioner of criminal charges filed against him; and (3) conducted himself in a manner unbecoming of the Baltimore City Police Department.

General Order C-2 of the Rules and Regulations of the Baltimore City Police Department states, in relevant part:

Rule 1, Conduct:

> Any breach of the peace, neglect of duty, misconduct or any conduct on the part of any member of the department, either within or without the City of

> Baltimore, which tends to undermine the good order, efficiency or discipline of the department, or which reflects discredit upon the department or any member thereof, which is prejudicial to the efficiency and discipline of the department, even though these offenses may not be specifically enumerated or laid down, shall be considered conduct unbecoming a member of the Baltimore Police Department, and subject to the disciplinary action by the Police Commissioner.

Rule 1, § 18:

> No member of the Department shall violate any Federal or State law or City ordinance.

Rule 8, § 5(a):

> Any member of the department summoned to the State's Attorney's Office of Baltimore City or any other prosecutor, or before any court concerning any matter in which the officer or any member of the department may become a defendant, must report the facts in writing to the Police Commissioner through official channels.

Upon remand, the Trial Board found that appellant had violated Rule 1 and Rule 8 § 5(a) of the Rules and Regulations of the Baltimore City Police Department. The Board recommended that appellant be suspended without pay for 60 days. The

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Police Commissioner reinstated appellant, without back pay, and affirmed the Board's decision. As mentioned, the circuit court struck the 60-day suspension but left intact the remainder of the Commissioner's order.

It was wholly within the discretion of the Police Commissioner to terminate appellant, on the basis of the charges other than violation of a criminal statute, even after the remand by Judge Ward. Section 16-7(7) of the local laws of Baltimore City states that the Police Commissioner has the power to: "appoint, promote, reduce in rank, grade or position, reassign, reclassify, retire and discharge all members of the Department in the manner prescribed by law." Baltimore, Md., art. 4, § 16-7(7) (1979). The determination to reinstate appellant, but without back pay, instead of terminating his employment, was a

decision entirely within the Commissioner's discretionary authority.

II

Appellant's last argument is based on the faulty premise that he was wrongfully discharged. He was not. As an effect of the administrative and judicial proceedings, appellant performed no services for the Department for about a year. Since it was within the discretion of the Police Commissioner to terminate or otherwise punish appellant, there was nothing inappropriate or illegal in the decision to reinstate appellant but not pay him for the time he was not working. In effect, he was suspended from that period of time, not fired.

JUDGMENT AFFIRMED

COST TO BE PAID BY APPELLANT

CHARLES CARTER	*	In the
	*	Court of Appeals
v.	*	of Maryland
	*	Petition Docket No. 259
BALTIMORE CITY POLICE DEPARTMENT	*	September Term, 1992
	*	(Nos. 1199 and 1788, September Term, 1991, Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: October 7, 1992